Supreme Court, U.S.
FILED
NOV 22 2002
OFFICE OF THE CLERK

No. 02-498

IN THE

Supreme Court of the United States

ARTHUR ANDERSEN LLP,

Petitioner,

v.

HARRY BERGER and BERNARD CUTLER, individually and on behalf of a class similarly situated,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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November 22, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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Respondents deny that the courts of appeals have taken irreconcilable views with respect to the question presented. Respondents assert that the circuits all "unmistakably" agree on a single, easily administered rule: a putative class action does not toll the limitations period for subsequent class claims *unless* class certification in the original case was denied "because of a defect in the class representative." Opp. at 5-6. To be sure, this is the Third Circuit's rule announced in the decision below. Pet. App. at 15a (holding "that the class claims of intervening class members are tolled if a district court declines to certify a class for reasons unrelated to the appropriateness of the substantive claims for certification"). But Respondents' claim that the other circuits follow that rule is wishful thinking.

There is no way to fit *Griffin* v. *Singletary*, 17 F.3d 356 (11th Cir. 1994), into the rule asserted by Respondents and adopted by the Third Circuit in this case. The Eleventh Circuit in *Griffin* refused to apply this Court's class tolling rule, first announced in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), to class claims filed after a previous class action had failed for "reasons unrelated to the appropriateness of the substantive claims for certification." Pet. App. at 15a. The Sixth Circuit, in *Andrews* v. *Orr*, 851 F.2d 146 (6th Cir. 1988), took the same view as the Eleventh Circuit: a previously filed class action does not toll the limitations period for subsequent class claims regardless of *why* the previous class action failed. The decision in *Catholic Social Services, Inc.* v. *INS*, 232 F.3d 1139 (9th Cir. 2000), cannot be squared with the Third Circuit's rule either. While a closely divided Ninth Circuit, sitting *en banc*, allowed tolling in that case, the majority specifically rejected the Third Circuit's rule and adopted a narrower one. Finally, while the facts presented in *Basch* v. *Ground Round, Inc.*, 139 F.3d 6 (1st Cir. 1998), *Korwek* v. *Hunt*, 827 F.2d 874 (2d Cir. 1987), and *Salazar-Calderon* v. *Presidio Valley Farmers Ass'n*, 765 F.2d 1334 (5th Cir. 1985), fit the Third Circuit's rule, nothing in the reasoning of those decisions suggests that the Third Circuit's factual distinction was important or even considered in those decisions.

Respondents further argue that the petition is a challenge to this Court's reasoning in *American Pipe*. Opp. at 16. Not so. Respondents badly distort Petitioner's argument. Petitioner argued that prohibiting class tolling for subsequent class claims would, consistent with the policies identified in *American Pipe*, "enhance, not undermine, the efficient resolution of the dispute." Pet. at 10. Respondents, obviously, disagree. Because the courts of appeals have taken different views of the matter, only this Court can decide who is right. Accordingly, the petition should be granted.

1. The Decisions Of The Courts Of Appeals Conflict With The Third Circuit's Rule. The Third Circuit, in the decision below, became the first court of appeals to hold that *American Pipe* tolling applies to class claims filed after a "district court declines to certify a[n identical] class for reasons unrelated to the appropriateness of the substantive claims for certification." Pet. App. at 15a. Respondents have failed to square this holding with the decisions of the other courts of appeals.

In *Griffin*, the Eleventh Circuit refused to apply *American Pipe* tolling to class claims brought after an identical previous class action had failed. The previous class claims had failed solely because of defects in the three proposed class representatives. *Griffin*, 17 F.3d at 358 (explaining that two of three proposed class representatives lacked standing to assert the class's claims, and the third was subject to a defense unique to him). The district court in the earlier class case had certified a class, and the Eleventh Circuit reversed based on an intervening decision of this Court that rendered all the named plaintiffs inadequate. *Id.* Respondents seize on this fact as somehow reconciling *Griffin* with the decision below. Opp. at 13. But Respondents never explain how.

In fact, it is not possible to reconcile the decisions. Under the Third Circuit's rule, the fact that the district court had previously certified the class would have made it plain that tolling applies; the substantive claims had already been determined to be appropriate for class treatment. Yet the Eleventh Circuit flatly rejected tolling, refusing to adopt a rule that would permit plaintiffs to "engage in endless rounds of litigation ... over the adequacy of successive named plaintiffs to serve as class representatives." *Griffin*, 17 F.3d at 359. A more plain disagreement with the Third Circuit's decision below is hard to imagine.

Respondents assert that the Sixth Circuit's decision in *Andrews* can be squared with the Third Circuit's rule, but they make no effort explain how. Opp. at 9 (noting, simply, that the "Sixth Circuit agreed" with the district court that

tolling for class claims should not be allowed). The Sixth Circuit held "that the pendency of a previously filed class action does not toll the limitations period for additional class actions by putative members of the original asserted class." 851 F.2d at 149. Like the Eleventh Circuit, the Sixth Circuit did not ask *why* the "original asserted class" failed; indeed, the Sixth Circuit nowhere in its opinion even states *why* the previous class failed. In the Third Circuit, the answer, whether it involves defects in the named plaintiff or the amenability of the claim itself for class treatment, is pivotal. To the Sixth Circuit, it does not matter.

The Ninth Circuit's decision in *Catholic Social Services* cannot be squared with the Third Circuit's rule either. While the Ninth Circuit allowed tolling in that case, it did so on a very narrow ground, and it specifically rejected the Third Circuit's broader ground. As discussed in the petition, the earlier filed class action in *Catholic Social Services* had been properly certified by the district court, but later was decertified because of an intervening change in the law that rendered the named plaintiffs inadequate class representatives. Pet. at 14. Under the Third Circuit's rule, tolling should have applied simply because the previous class failed due to a defect in the class representative. But the Ninth Circuit refused to adopt this reasoning. Instead, the Ninth Circuit relied on the fact that originally the previous class had been properly certified. As a result, "[p]laintiffs in the class action now before us ... do not seek to cure any procedural deficiencies in the classes under Rule 23 certified in the first action because there were none." *Catholic Soc. Servs.*, 232 F.3d at 1149.

Respondents claim that *Catholic Social Services* holds that a previously filed class action tolls the limitations period for a subsequent class action if the "later filed class action ... [does] *not seek to relitigate the deficiency* that caused the earlier denial of class certification," and that the Third Circuit, in the decision below, held the same because "there

can be no dispute that Cutler's class action likewise *does not seek to relitigate the deficiency* that caused the earlier denial of certification." Opp. at 13-14. Respondents are wrong, as the Ninth Circuit's discussion of *Griffin* demonstrates.

The Ninth Circuit correctly characterized *Griffin* as a case in which the previous class action "was decertified because the individual named plaintiffs were not proper class representatives under Rule 23(a)(4), and the court refused to allow a later-filed class action that *sought to cure the procedural deficiencies of the first*." *Catholic Soc. Servs.*, 232 F.3d at 1148 (emphasis added). That is, the Ninth Circuit viewed a defect in the class representative as a "procedural deficiency" in the earlier filed class action that would prevent tolling. On the Ninth Circuit's view, then, Respondents' effort in this case to present a new class representative *is* an effort to "relitigate the deficiency that caused the earlier denial of class certification." Opp. at 14 (emphasis in original omitted). The Third Circuit allowed it; the Ninth Circuit would not have.

Finally, Petitioner recognizes that the Third Circuit's rule fits the *facts* of *Basch*, *Korwek* and *Salazar-Calderon*. Pet. at 16 (stating that the "Third Circuit's statement of the facts in these cases is fair"). But it is the reasoning of those decisions that cannot be squared with the Third Circuit's holding. As Judge Kozinski observed, had these decisions relied on issue preclusion, they could have said so. *Catholic Soc. Servs.*, 232 F.3d at 1155 (Kozinski, J., dissenting). Instead, they expressed concern about the potential infinitely to extend the limitations period if *American Pipe* tolling applied to subsequent class claims. *Basch*, 139 F.3d at 12; *Korwek*, 827 F.2d at 879; *Salazar-Calderon*, 765 F.2d at 1351.

Respondents, following the Third Circuit, argue that *Basch*, *Korwek*, and *Salazar-Calderon* stand for a rule that refuses to toll a class claim that "'attempt[s] to resuscitate a class that a court has held to be inappropriate as a class action.'" Opp. at 9; Pet. App. at 10a. According to Respondents, this is the

"basic ... analytic distinction" between denials of class certification based on defects in the class representative and such denials for other reasons. Opp. at 9. Respondents simply ignore Petitioner's challenge to that distinction. A previous denial of class certification, for whatever reason, hardly establishes conclusively that the claims are not amenable to class treatment. Pet. at 18 n. 6. To Respondents and the Third Circuit, it is unfair to deprive plaintiffs of the opportunity to assert class claims because a previous named plaintiff was inadequate. But Respondents, and the Third Circuit, find no unfairness when plaintiffs are deprived of the opportunity to assert class claims because a previous named plaintiff's counsel failed to present the strongest reasons why the claims present, for example, predominant issues common to the class. There is hardly a clear "analytic distinction" between the two cases. Yet no Court of Appeals has ever suggested that *American Pipe* tolling should always apply to subsequent class claims.

In the end, the courts of appeals' decisions on this issue cannot be reconciled, either based on their facts or based on their reasoning.[1] Only this Court can provide a uniform rule for the maintenance of federal class actions.

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[1] Respondent also denies that any district court has refused to apply *American Pipe* tolling to a class claim when a previous class claim had been defeated because of a defect in the class representative. Opp. at 10-12 & n.4. Respondent is wrong. In *Fleck* v. *Cablevision VII, Inc.*, 807 F. Supp. 824 (D.D.C. 1992), a previous class action had been denied because the named plaintiffs' claims "were not typical of the claims of the proposed class." *Id.* at 825. Nonetheless, the court refused to toll the limitations period for the subsequent class claim. And in *Fleming* v. *Bank of Boston Corp.*, 127 F.R.D. 30 (D. Mass. 1989), the original class action failed because the named plaintiff "lacked standing to assert the claims." *Id.* at 31. In discussing *American Pipe* tolling under these circumstances, the court said, "'I am troubled by the potential abuse of a rule extending class action tolling to all cases in which certification is denied for lack of standing.'" *Id.* at 36 (quoting *In re Elscint, Ltd. Sec. Litig.*, 674 F. Supp. 374, 378 (D. Mass. 1987)).

2. This Case Presents An Important Question Regarding The Most Efficient Resolution Of Class Claims. Petitioner argued that denying *American Pipe* tolling for class claims would enhance the efficient resolution of class action lawsuits. Pet. at 10-11. Putative class members who believe they will be appropriate class representatives and desire to assert their claims on behalf of a class are encouraged to present themselves to the court at the outset of the litigation. And class counsel would be encouraged to find appropriate class representatives at the outset of the litigation. The early determination of class status is the stated policy of Fed. R. Civ. P. 23(c)(1), and the early presentation to the court of potential class representatives has become the policy of Congress with respect to securities class actions. 15 U.S.C. §§ 77z-1, 78u-4.

Somehow, Respondents read into this analysis an attack on *American Pipe*'s sound discussion of the need to prevent repetitive filings of identical individual claims. Opp. at 15-18. Respondents are conflating two different issues. *American Pipe* was designed to ensure that putative class members did not need to file their individual claims during the pendency of a class action to preserve those claims in the event the class case failed. *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350 (1983). Such filings would undermine the efficiencies of the class action device. That is very different from encouraging putative class members who desire to bring their claims on behalf of a class to seek to become class representatives early in the litigation, rather than waiting for someone else's class case to fail.

In this vein, it is noteworthy that Respondents have nothing at all to say about the incentives the Third Circuit's rule places on class counsel, even though class counsel plays a critical role in class litigation. Pet. at 11. Class counsel often find class representatives, not the other way around. Class counsel should be encouraged to bring a proper plaintiff forward early in the litigation, rather than moving for

certification with one class representative, going through discovery, briefing and a decision from the district court denying certification because the representative is inadequate, and then going out and finding another class representative. This wasteful exercise is precisely what happened in this case.[2] The Third Circuit's rule places no incentive on class counsel to produce a proper class representative early. Petitioner's rule would. The importance of the efficient administration of justice in the federal courts independently justifies and reinforces the rationale for certiorari based on the decisional conflict over the proper application of *American Pipe*.

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] Counsel often present multiple class representatives, in part to ensure that a class case does not come to a halt and start over in the event that one particular class representative is discovered to be inadequate. Respondents in this case did not follow this common practice.